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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-731

FRED THOMAS, SHERIFF, D. C. YEARWOOD, DEPUTY SHERIFF, and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

vs.

E. E. MORGAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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NOTE: Unless otherwise indicated, emphasis in matter quoted in this Petition has been supplied.

IN THE

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FRED THOMAS, SHERIFF, D. C. YEARWOOD, DEPUTY SHERIFF, and UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

vs.

E. E. MORGAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners Fred Thomas, Sheriff, D. C. Yearwood, Deputy Sheriff, and United States Fidelity and Guaranty

Company,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of a majority of a panel of the United States Court of Appeals for the Fifth Circuit entered in this habeas corpus proceeding on September 17, 1971.

On the basis of the 5th Amendment privilege, said decision of the Fifth Circuit reversed the District Court and nullified a State court civil contempt decree that had been entered as a civil remedial process to enforce a prior State court decree. The prior State court decree had been affirmed by the Mississippi Supreme Court, and this Court had denied certiorari to review such affirmance.

As hereinafter shown in more detail, the decision of the Fifth Circuit is in direct conflict with two decisions of the Mississippi Supreme Court on an important question of federal law, and conflicts in principle with prior decisions of this Court.

OPINIONS BELOW

The opinions of the Court of Appeals, not yet reported, appear in the Appendix hereto. The opinion of the District Court for the Southern District of Mississippi is reported in 321 F.Supp. 565 (D.C. Miss. 1970), and appears in the Appendix hereto. (In accordance with Rule 23, this Appendix is separately presented.)

The two opinions of the Mississippi Supreme Court with which the decision of the Court of Appeals is in direct conflict are reported as follows:

E. E. Morgan v. *USF&G*, 222 So.2d 820 (Miss. 1969); certiorari denied 396 U.S. 842 (1969);

E. E. Morgan v. *USF&G*, 245 So.2d 587 (Miss. 1971).

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1. Petitioner United States Fidelity and Guaranty Company is hereinafter referred to as "USF&G." The Respondent E. E. Morgan is hereinafter referred to as "Morgan."

Copies of these two opinions are included in the Appendix hereto.

The opinion of the Mississippi Supreme Court in a companion or parent case is reported as *E. E. Morgan* v. *USF&G*, 191 So.2d 917 (Miss. 1966), and appears in the Appendix hereto.[2]

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on September 17, 1971. A timely petition for rehearing en banc was denied on November 15, 1971, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Whether Respondent Morgan, by the effect of his own voluntary acts and representations, including his express contractual agreement to furnish financial statements to USF&G upon request, has precluded himself from asserting the 5th Amendment privilege as an excuse for refusing to disclose his assets to USF&G in a civil suit brought for the legitimate noncriminal purpose of (1) enforcing specific performance of Morgan's voluntary contractual agreement to furnish financial statements to USF&G, and (2) for discovery of Morgan's assets.

2. Stated differently, the question is whether the District Court was correct in holding that Morgan is bound to disclose his assets to USF&G and is precluded by waiver and estoppel from refusing to do so on the alleged ground of possible self-incrimination, the finding of waiver and

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2. The 1969 decision of the Mississippi Supreme Court refers to this 1966 decision as the "parent case." 222 So.2d 820 at 822, App. C, p. A79.

estoppel being based on Morgan's voluntary representations and express agreements that make it inconsistent, unjust, inequitable and unconscionable to permit Morgan to invoke the privilege as an excuse for refusing to disclose his assets.

3. Alternatively, if Morgan has not waived or is not estopped to invoke the privilege, whether Morgan is exposed to any *real* and *substantial* hazard of incrimination and prosecution by merely disclosing the nature, situation, description, and character of his assets.

4. Whether Morgan was properly adjudged in civil contempt for his refusal to comply with that part of the State court decree which enforces specific performance of Morgan's voluntary contractual agreement to furnish financial statements, even if it be held that Morgan is not bound to comply with that provision of the State court decree which requires discovery under oath of Morgan's assets.

5. Whether, as strongly urged by the dissenting member of the panel below, under the 5th Amendment and the Supremacy Clause, the Federal courts should permit enforcement of the State court decree by affording a judicially established use immunity, and adjudicating that Morgan must furnish the information required by the State court decree, but he shall not be subject to any criminal proceeding based upon the information disclosed or its fruits.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are: The Supremacy Clause of the United States Constitution, Article VI, Clause 2; the Fifth Amendment to said Constitution; and Section 1 of the 14th Amendment to said Con-

stitution. These provisions appear in Volume 1 of the United States Code (1970 Ed.), at pages xlvii, xlviii, and xlix. Copies thereof are set forth in the Appendix hereto.

STATEMENT OF THE CASE

As expressly held by the District Court, a correct understanding of the facts is essential to a proper resolution of the issues.

Many of the controlling facts are set out in the opinion of the District Court and the 1966 decision of the Mississippi Supreme Court in the parent case (App. B and App. E).

As there shown, Morgan is an experienced contractor and wealthy financier who had considerable financial resources and was experienced in financing various types of transactions (App. B, p. A26). R. W. Hyde, Jr. (Hyde) was an experienced contractor who wanted to expand his business by taking on more and larger contracts, but did not have sufficient assets to enable him to obtain the necessary surety bonds for more and larger jobs. Accordingly, in order to increase their bonding capacity, and for the specific purpose of inducing USF&G to become their surety on more and larger jobs, Morgan and Hyde entered into two separate business agreements with each other.

In regard to contracts to be obtained by competitive bidding, Morgan and Hyde entered into a partnership agreement whereby they became *actual partners* on these projects. They also entered into a separate agreement under which Morgan was to receive a commission from Hyde for signing indemnity agreements on projects that were obtained by negotiation rather than by competitive bidding (App. B, pp. A26-A27).

Thereafter, by numerous representations, by furnishing copies of both of their business agreements to USF&G, by Morgan's furnishing copies of his financial statements to USF&G, and by executing bond applications and indemnity agreements, Morgan and Hyde were able to induce USF&G to become surety on the performance and payment bonds that were required of Morgan and Hyde in connection with the numerous larger projects (App. B, pp. A26-A27, A52).

Morgan orally promised and represented that he would indemnify USF&G on each and every job, and he also executed written bond applications and indemnity agreements to induce USF&G to become surety on each and every bond involved in the present controversy.

In every instance, USF&G acted in reliance on the representation and agreement that the combined net worth and combined assets of Morgan and Hyde were bound and would be available for the complete protection and indemnification of USF&G (App. B, p. A52). These representations and agreements induced USF&G to write surety bonds on numerous projects involving many millions of dollars (App. B, p. A52).

In regard to each and every bond, Morgan voluntarily and specifically agreed to fully reimburse, protect, and indemnify USF&G against any loss whatsoever on account of its suretyship. In every instance, Morgan expressly agreed to place USF&G in funds with which to pay creditors on the projects (App. B, p. A52).

All of the indemnity agreements expressly provided that they should be "liberally construed" in favor of USF&G.

In connection with a large project for the City of Shively, Kentucky,[3] Morgan expressly, specifically and personally bound himself to furnish USF&G financial statements showing his current financial position, when requested to do so (App. B, pp. A52, A76-A77). The Shively application provided that each applicant would:

> "furnish to Sureties, upon request and at such reasonable intervals of time as sureties may designate, financial statements showing the current financial position of the applicant of whom such request for a statement is made." (App. B, p. A65).

The Shively application also provided that it should be "liberally construed so as to fully protect and indemnify" USF&G.

In order to induce USF&G to become his surety on the Shively project, Morgan not only signed a printed form of indemnity agreement, but he also personally signed a letter in which he individually bound himself to all the terms and conditions of the Shively application *"just as though I were named as one of the applicants therein and my signature were duly affixed thereto."*[4]

All of these agreements were signed by Morgan in order to pledge his assets to the indemnification of USF&G so as to induce USF&G to become surety. The very pur-

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3. As late as March 1969, the City of Shively was continuing to assert a claim of over $3 million against the contractors, and USF&G was confronted with a potential claim for the full penalty of the performance bond. *City of Shively* v. *Hyde et al.*, 438 S.W.2d 512, 514 (Ky. 1969). The ultimate loss to the sureties on the Shively job was about $126,000 (Civil Contempt Record, pp. 124-126).

4. This letter is quoted in full in the opinion of the District Court (App. B, p. A63), and the 1969 opinion of the Mississippi Supreme Court (App. C, pp. A98-A99).

pose of Morgan's business association with Hyde was to induce USF&G to become surety (App. E, pp. A107-A109).

Thus, there can be no real question that, in every instance, USF&G bound itself as surety in reliance upon Morgan's numerous actions, promises, assurances, and agreements, *the composite effect of which was a deliberate representation that Morgan's extensive assets were bound and would remain available for the complete protection of USF&G.* Circuit Judge Gewin correctly states that there is ample evidence in the record to support the conclusion that *"Morgan was the moving influence in all of the transactions under consideration."* (App. A, p. A24).

From these contracting operations, Morgan withdrew more than $500,000 in cash, plus $316,000 in notes, which he took for himself as personal profits from this venture (App. E, pp. A109, A117-A118). Yet when laborers and materialmen began making demand for payment, Morgan not only refused to pay them, but he refused to place USF&G in funds with which to pay them, and he even refused to furnish USF&G with financial statements showing his financial position. USF&G made repeated unsuccessful requests for such financial statements, but Morgan has still not furnished such statements.

As a result of Morgan's attempted repudiation of his agreements, USF&G was required to pay out millions of dollars and to resort to litigation in an effort to compel Morgan to do that which he had voluntarily agreed to do. USF&G brought suit against Morgan and Hyde and certain corporations controlled by them, and recovered a final decree in 1965.

This 1965 decree expressly adjudicated that Morgan and the other defendants are obligated "*to perform specifically each and every obligation assumed by them under*

the terms of each of the various bond applications and indemnity agreement signed by them . . . and to exonerate and secure [USF&G] against ultimate loss in the premises on account of the execution of said bonds . . ." (App. C, pp. A97-A98, A101-A102). This 1965 decree also awarded money judgments in various amounts against the several defendants.

Hyde and his corporations did not appeal from the 1965 decree. Morgan and his corporations did appeal, and the Mississippi Supreme Court unconditionally affirmed the 1965 decree in 1966 (App. E, p. A105).

Morgan did not seek further review of the 1965 decree, and it has long since become final. Nevertheless, Morgan has refused to comply with that decree.

Following the 1965 decree, Hyde made a full disclosure of his assets to USF&G. *However, Hyde had no substantial assets, because Morgan had previously taken over virtually all of Hyde's assets.*[5]

On the other hand, Morgan continued a deliberate course of conduct designed to place his assets beyond the reach of USF&G. Morgan had embarked upon this course of action at the very time that USF&G was asserting its claim against him in the courts and at the very time he was professing to have a meritorious defense to that claim. Thus, shortly before USF&G obtained the 1965 decree against Morgan, he converted large real estate holdings into cash, and then, immediately after USF&G obtained

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5. The 1969 opinion of the Mississippi Supreme Court states: "Hyde surrendered all assets which had not been taken over by appellant [Morgan]." (App. C, p. A87) footnote. In the 1965 parent case the Chancellor found: ". . . What do we find Ed Morgan doing to Bob Hyde? . . . He ties him up lock, stock and barrel. *Everything that he can possibly take away from him, he does.*" (Parent case record, p. 1936).

the 1965 decree, Morgan closed out his bank accounts, closed out his brokerage accounts, and absented or concealed himself so that he could not be served with process.

Shortly after the 1965 decree had been entered, USF&G again requested that Morgan furnish USF&G with his financial statement. Morgan ignored this request.

In 1967, after Morgan returned to Mississippi and could be served with process, USF&G filed a second suit seeking (1) to enforce the 1965 decree, (2) to enforce specific performance of Morgan's agreement to furnish current financial statements, (3) to obtain a discovery of Morgan's assets, and (4) to obtain other equitable relief, including the appointment of a receiver (App. B, p. A32).

The 1967 complaint contained a detailed prayer for relief, including separate and distinct prayers for (a) specific performance and (b) discovery.

Paragraphs 3 through 7 of the 1967 complaint sought *specific performance* of Morgan's agreement to furnish financial statements.

Morgan's answers to the 1967 complaint are significant. He did *not* invoke the privilege against self-incrimination as a purported defense to *specific performance*. He merely denied that he was required to furnish the financial statements, erroneously contending that specific performance had been denied in the parent case and that such denial was res judicata (App. B, p. A60).

The next paragraph of the 1967 complaint, paragraph 8, was in the nature of a judgment-creditor's bill and contained the standardized allegations customarily made in such a bill. Paragraph 8 averred that Morgan had concealed substantial assets and resorted to other devices for

the purpose of hindering, delaying, and defrauding USF&G of its rights as a judgment creditor.

Morgan's answers did invoke the privilege as to a part of paragraph 8 of the complaint. In this connection, Morgan principally relied on two Mississippi statutes making it a misdemeanor to remove or conceal property subject to a mortgage or lien, including a judgment lien.[6]

A preliminary hearing was held to determine the claim of privilege that had been asserted in regard to a part of paragraph 8.

The Chancery Court ruled that Morgan was bound by contract to inform USF&G of the "nature, value, amounts, and whereabouts of his assets" and that he was *estopped* to refuse to make such disclosure. However, the Chancellor also ruled that at that time Morgan would not be required to file an answer to those particular averments of paragraph 8 that alleged concealment of assets and resort to other fraudulent devices.

Subsequently, the case was tried on the merits. Morgan could not be found for service of a subpoena and did not appear or testify. USF&G presented detailed evidence which strongly indicates that Morgan owns or controls several million dollars worth of liquid assets, consisting of cash, bearer bonds and negotiable securities—assets that are easy to conceal and difficult to find. The uncontradicted proof showed that, despite diligent efforts, USF&G had been unable to locate any substantial assets of Morgan.

On August 7, 1967, the Chancery Court entered a final decree in favor of USF&G.

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6. §§ 2250 and 2252, Mississippi Code of 1942, set forth *infra*, App. B, pp. A33, A34.

Paragraph 6 of the 1967 decree granted *specific performance* of Morgan's agreement to furnish financial statements, and directed Morgan to furnish USF&G with a financial statement in a standard form set out in the decree. This financial statement was *not* required to be under oath.

Paragraph 7 of the 1967 decree granted *discovery* and directed Morgan to furnish to USF&G a statement in writing setting forth the identity, status, location, and custody of his assets. That statement was to be under oath.

After the final decree had been entered, Morgan filed "Exceptions to Final Decree." Among other things, Morgan sought to invoke the privilege as to paragraphs 6 and 7 of the decree. As stated above, Morgan had not previously invoked the privilege as a defense to *specific performance* of his obligation to furnish financial statements. After hearing, the exceptions were overruled.

Pending appeal, Morgan obtained a stay of paragraphs 6 and 7.

In 1969, without dissent, the Mississippi Supreme Court affirmed the 1967 decree in all respects, holding that Morgan has waived and is estopped to invoke the privilege against self-incrimination as an excuse for refusing to disclose his assets. *E. E. Morgan* v. *USF&G*, 222 So.2d 820 (Miss. 1969), Appendix C hereto.

As noted by the District Court, the Mississippi Court recognized that the question of privilege was governed by federal standards and scrupulously applied those standards in making its determination (App. B, pp. A54, A38).

In regard to the right of *discovery*, the Mississippi Court said:

"If the constitutional privilege is applicable, we must also reach the question of whether it was *waived through estoppel.*" (App. C, p. A92, 222 So.2d at 828).

The Mississippi Court then held that Morgan has waived and is estopped to invoke the privilege as an excuse for refusing to make discovery of his assets (App. C, pp. A95-A101).

The Mississippi Court next dealt with the question of *specific performance* of Morgan's contractual obligation to furnish financial statements. On this question, the Court expressly held that the right to specific performance of this obligation had been adjudicated in favor of USF&G in the parent case and that Morgan was obligated to furnish USF&G the financial statement required by paragraph 6 of the 1967 decree (App. C, pp. A101-A102).

Pending application for certiorari, the Mississippi Court granted a further stay of paragraphs 6 and 7.

This Court denied certiorari to review the 1969 decision of the Mississippi Court. *E. E. Morgan* v. *USF&G*, 396 U.S. 842 (1969).

In 1970, after certiorari had been denied, the Chancery Court adjudged Morgan in civil contempt for his continued refusal to comply with the 1967 decree. The civil contempt decree directed that Morgan be confined until he purged himself of civil contempt by complying with paragraphs 6 and 7 of the decree. The contempt decree also imposed a civil fine to be paid until Morgan purged himself of civil contempt. Morgan has never been confined and has not paid any fine. Morgan has remained at large pursuant to a $100 bond filed in the present habeas corpus case.

On the same day that the civil contempt decree was entered, Morgan filed the present habeas corpus proceeding collaterally attacking the civil contempt decree. The jurisdiction of the Federal District Court was invoked under 28 U.S.C. § 2241. Contemporaneously with the filing of his habeas corpus petition, Morgan also appealed the civil contempt decree to the Mississippi Supreme Court. Before that appeal was heard, the habeas corpus case was tried in the Federal District Court.

After a full hearing, including consideration of voluminous evidence, together with briefs and arguments of counsel, the District Court rendered a comprehensive opinion setting forth its Findings of Fact and Conclusions of Law and holding that Morgan's habeas corpus petition should be dismissed with prejudice (App. B, pp. A26-A78).

After disposing of certain preliminary questions, the District Court stated "It now devolves upon this Court to determine whether this constitutional privilege was waived through estoppel, as was held by the Mississippi Supreme Court." (App. B, p. A61).

The District Court then reviewed the facts, discussed numerous authorities, and expressly held that Morgan has waived *and* is estopped to invoke the privilege as a basis for refusing to disclose his assets to USF&G (App. B, pp. A61-A78).

The District Court further stated that *"to hold otherwise would be contrary to the established law; the equities of the situation, and would be unconscionable."* (App. B, p. A77).

Accordingly, the District Court held that Morgan is required to furnish both (1) the financial statement as directed by paragraph 6 of the 1967 decree, and (2) the written discovery statement concerning Morgan's assets

as directed by paragraph 7 of the 1967 decree (App. B, pp. A77-A78).

The District Court further stated:

> "In any event, if the Court is mistaken in this regard, *it is perfectly clear that the financial statement must be furnished, and that petitioner's refusal to furnish it herein justifies his adjudication of civil contempt.*" (App. B, p. A78).

Accordingly, in November 1970, the District Court entered its final order dismissing Morgan's habeas corpus petition.

Subsequently, on March 1, 1971, without dissent, the Mississippi Supreme Court affirmed the civil contempt decree in all respects. Appendix D hereto, *E. E. Morgan* v. *USF&G*, 245 So.2d 587 (Miss. 1971).[7]

In the meantime, Morgan had appealed the present habeas corpus case to the Fifth Circuit. On September 17, 1971, a majority of a panel of that Court (Circuit Judges Brown and Morgan) rendered an opinion reversing the judgment of the District Court. Circuit Judge Gewin dissented in part and concurred in part.

In essence, the majority held (1) that the privilege cannot be relinquished by a prior voluntary contract to furnish information, and (2) that Morgan had not relinquished the privilege by conduct giving rise to an equitable estoppel (App. A, pp. A10-A11, A21-A22).

In his separate opinion, Judge Gewin strongly urged that Morgan should be required to obey the State court

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7. Morgan's petition for certiorari to review that decision is now pending in this Court as No. 70-344, October Term, 1971. On November 17, 1971, Morgan filed a motion under Rule 60 to dismiss this petition.

decree in its present form, but he should be afforded immunity from the use of the required information or its fruits (App. A, pp. A22-A25).

Judge Gewin also maintained that in view of Morgan's "representations, promises, and assurances" that induced USF&G to act to its detriment, Morgan "should not be permitted to nullify the Chancellor's decree by suggesting an imaginary and elusive possibility of a criminal prosecution. . . ." (App. A, p. A24).

A timely petition for rehearing en banc was denied on November 15, 1971. Judge Gewin dissented from such denial (App. F, pp. A121-A122).

SUMMARY OF REASONS FOR GRANTING THE WRIT

A. This is a purely civil case involving the orderly enforcement of a prior judicial decree and the fair administration of civil justice. The Mississippi Supreme Court has twice held in this same case that Morgan is barred and precluded from asserting the privilege against self-incrimination as an excuse for refusing to disclose his assets to USF&G, as he had expressly and unconditionally bound himself to do. This Court has heretofore denied certiorari to review the 1969 decision of the Mississippi Supreme Court which decided the identical federal questions here presented. In the present habeas corpus case, after exercising its own independent judgment on the facts and the law, the District Court has agreed with the holding of the Mississippi Supreme Court.

The holding of the District Court is based upon all the facts of this case, including Morgan's antecedent representations and his express agreements that make invocation of the privilege inconsistent and unconscionable.

The holding of the District Court is clearly correct, is firmly supported by abundant authority, and accords with every principle of right, justice, and fairness. On the other hand, the decision of the Fifth Circuit creates a serious and unnecessary obstruction to the fair administration of civil justice and conflicts in principle with prior decisions of this Court.

B. The District Court has applied basic principles of estoppel and waiver announced in prior decisions of this Court. Estoppel and waiver have often been applied by this Court to bar inequitable assertion of constitutional rights in civil cases. Estoppel or waiver may result from a deliberate election, or from a voluntary course of conduct that is inconsistent with the assertion of the right and renders it unjust and inequitable to permit assertion of the constitutional right. *Shepard* v. *Barron*, 194 U.S. 553, 565, 568 (1904). Estoppel or waiver may operate to bar any constitutional right or privilege that is conferred for the personal benefit or protection of the person as to whom the estoppel or waiver is claimed. Since the privilege against self-incrimination is a purely personal privilege intended for the sole benefit of the individual, it is subject to estoppel and waiver.

Waivers may be either express or implied. Like estoppel, implied waivers are based upon objective criteria and considerations of fairness, justice, and consistency; such waivers do not depend upon the subjective intention of the privileged person. *Brown* v. *U. S.*, 356 U.S. 148 (1958), affirming *Brown* v. *U. S.*, 234 F.2d 140, 144, 145 (C.A. 6, 1956).

This Court has expressly held that rights under both the Fourth and Fifth Amendments may be waived by a prior voluntary contract to furnish information, and the principles of that decision are directly applicable here. *Zap* v. *U. S.*, 328 U.S. 624 (1946).

C. The central standard for the application of the privilege is whether the person claiming the privilege is confronted by substantial and real and not merely trifling or imaginary hazards of incrimination and prosecution. Morgan is not exposed to any substantial and real hazard of incrimination by merely making a written disclosure of his assets. At most, Morgan merely shows a remote and bare possible contingency that should not be suffered to obstruct the administration of civil justice.

D. The State court decree grants two separate forms of relief: (a) specific performance of Morgan's express contractual agreement to furnish financial statements; and (b) discovery. Even if it be assumed that Morgan is not required to make the discovery, it is perfectly clear that he has been validly directed to furnish the financial statement, and his refusal to do so justifies the adjudication of civil contempt. Morgan's specific agreement to furnish financial statements overrides any possible claim of privilege. Consequently, that part of the decree which grants specific performance is unquestionably valid. Even if a decree is invalid in part, failure to comply with the valid part justifies an adjudication of civil contempt. *Tinsley* v. *Anderson*, 171 U.S. 101, 107 (1897).

E. In any event, as urged by the dissenting member of the panel below, the Federal courts should permit enforcement of the State court decree by affording a judicially established "use immunity," and adjudicating that Morgan must furnish the information required by the State court decree, but he shall not be subject to any criminal proceeding based upon such disclosure or its fruits. *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 75 (1964); *Uniformed Sanitation Men Association, Inc.* v. *Commissioner*, 426 F.2d 619, 623-624, 626 (C.A. 2 1970).

REASONS FOR GRANTING THE WRIT

I.

The Decision Below Seriously and Unnecessarily Impairs the State's Ability to Enforce Its Civil Judicial Decrees and Is in Direct Conflict with Two Decisions of the Mississippi Supreme Court on an Important Question of Federal Law.

This is a purely civil case involving the orderly enforcement of a prior judicial decree for specific performance and the fair administration of justice between civil litigants. The net effect of the Fifth Circuit decision is that, in a civil case, a person may not be held to have precluded himself from asserting the privilege by his own voluntary agreements or a course of conduct that is inconsistent with the assertion of the privilege and renders invocation of the privilege unjust and unconscionable.

With all deference, such a holding is wrong by both legal and moral standards. Such a holding seriously impairs the fair administration of civil justice and a State's ability to enforce its judicial decrees. The holding conflicts in principle with prior decisions of this Court, and it is in direct conflict with two adjudications of the Mississippi Supreme Court in this same controversy.

The fair adjudication of civil disputes between citizens ranks very high in the public policy of this Nation. Consequently, this Court has held that in *civil cases,* the privilege against self-incrimination is *not* absolute, and considerations of consistency, justice, and fairness prevail in determining the scope and limits of the privilege. Thus, in the landmark civil case of *Brown* v. *U. S.,* 356 U.S. 148 (1958), this Court applied a rule of *constructive* or *implied* waiver, and said:

"The *interests of the other party* and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the *balance of considerations* determining the *scope* and *limits* of the privilege against self-incrimination. . . ." (356 U.S. at 156).

Similarly, in the famous case of *Boyd* v. *U. S.*, 116 U.S. 616, 624 (1886), this Court stressed the importance of civil proceedings to enforce judgments and "effect the ends of justice." *Boyd* involved a proceeding by the Federal government to forfeit goods for nonpayment of import duty. In holding that a statute providing for the compulsory production of documents violated the 4th and 5th Amendments, this Court carefully distinguished that forfeiture proceeding from a civil proceeding to enforce a judgment, and said:

"*. . . nor is the examination of a defendant under oath after an ineffectual execution, for the purpose of discovering secreted property or credits, to be applied to the payment of a judgment against him, obnoxious to those [4th and 5th] Amendments.*

* * *

"*. . . and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill of discovery; . . .*" (116 U.S. at 624).

A recent important decision of this Court clearly establishes that in cases having a legitimate *noncriminal* purpose that is directly related to a State's governmental interest, the 5th Amendment privilege is not to be given a liberal or unrestricted application, but must be weighed

and balanced against the public interest that the State is seeking to protect. *California* v. *Byers,* 29 L.Ed.2d 9, at 17, 18, 19, 29, 31, 35 (1971) (upholding the California statute requiring motorists to furnish information in regard to automobile accidents).

In *Byers,* the controlling opinions of Mr. Chief Justice Burger and Mr. Justice Harlan both emphasized that the State's purpose in seeking the required information was essentially *noncriminal* and that the State had a legitimate governmental interest in requiring the information to be furnished. 29 L.Ed.2d at 18, 19, 29, 35. In the present case, the State court decree is purely civil, it is certainly noncriminal in its purpose, and the State of Mississippi has a vitally important governmental interest in the enforcement of its judicial decrees. We submit, therefore, that the considerations that governed in *Byers* are highly relevant and should prevail here.

Finally, there can be no question that the decision of the Fifth Circuit is in direct conflict with the 1969 and 1971 decisions of the Mississippi Supreme Court in this same case. As previously shown, both of those decisions expressly held that Morgan has waived and is estopped to assert the privilege as an excuse for refusing to disclose his assets to USF&G.[8]

Petitioners recognize that the privilege may be available in civil cases. Petitioners firmly submit, however, that under the prior decisions of this Court, in civil cases, assertion of the privilege may be precluded by prior voluntary contract, by equitable estoppel, or by waiver im-

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8. It is well settled that a direct conflict between the decision of a court of appeals and that of the highest court of a State on a question of federal law fully warrants and justifies a grant of certiorari. *Stern & Gressman, Supreme Court Practice* (4th Ed. 1969), § 4.9, p. 163, and § 4.27, p. 192.

plied from conduct. Petitioners further submit that the District Court and the State Supreme Court have correctly held that Morgan is barred and precluded from invoking the privilege as an excuse for refusing to disclose his assets, as he had freely and unconditionally bound himself to do.

II.

The Decision of the Court of Appeals Conflicts in Principle with Prior Decisions of This Court and the Purpose and Policies of the Privilege Against Self-Incrimination. On the Other Hand, the Decision of the District Court Is Clearly Correct and Is Firmly Supported by the Prior Decisions of This Court.

A. The District Court Was Clearly Correct in Holding That Morgan Has Waived and Is Estopped to Assert the Privilege Because of His Voluntary Agreements and Course of Conduct.

In upholding the State court decree, the District Court applied the firmly established rule that in civil cases, constitutional rights may be waived or lost by estoppel. This holding accords with every principle of right, justice, and fairness, and is firmly supported by the decisions of this Court.

It makes no difference whether the applicable principle be called estoppel, implied waiver, or express or implied contract. All of these doctrines are used to denote the termination, preclusion, or loss of rights which a party might otherwise have had but for his own voluntary actions. *Shepard v. Barron*, 194 U.S. 553, 568 (1904). Petitioners submit, however, that the doctrines of equitable estoppel and implied waiver are particularly applicable here.

Equitable estoppel results from any conduct, express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law. Estoppel does not depend upon any subjective intention to relinquish a known right, but upon the objective impressions created by a party's action, and a prejudicial change of position by the other party. Furthermore, constructive or imputed knowledge and intent are amply sufficient to create estoppel. *Yoshida* v. *Liberty Mutual Ins. Co.*, 240 F.2d 824, 829-830 (C.A. 9, 1957); 3 *Pomeroy, Equity Jurisprudence*, § 808b (5th Ed. 1941); *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232-234 (1959); *Dickerson* v. *Colgrove*, 100 U.S. 578, 580 (1880).

This Court has often applied the principles of estoppel to bar inequitable assertion of constitutional rights in civil cases. For example, in *Pierce Oil Corporation* v. *Phoenix Refining Co.*, 259 U.S. 125, 128, 129 (1922), involving an alleged denial of due process, this Court said:

> "There is nothing in the nature of such a constitutional right as is here asserted to prevent its being waived *or the right to claim it barred* as other rights may be, by deliberate election *or by conduct inconsistent with the assertion of such a right* [citing cases]." (259 U.S. at 128-129).

Both the District Court and the Mississippi Supreme Court have specifically relied on the principles announced in the leading case of *Shepard* v. *Barron*, 194 U.S. 553, 48 L.Ed. 1115 (1904). In *Shepard* v. *Barron*, this Court held that certain property owners had *waived* or were *estopped* to assert a denial of due process. The District Court quoted from *Shepard* as follows:

> "Provisions of a constitutional nature, intended for the protection of the property owner, may be

waived by him, not only by an instrument in writing, upon a good consideration, signed by him, but also by a course of conduct which shows an intention to waive such provision, *and where it would be unjust to others to permit it to be set up.* * * *

* * *

"*. . . A defense of this nature and upon these facts need not be placed entirely upon the strict and technical principles of an estoppel.* While it partakes very strongly of that character, it also assumes the nature of a contract, implied from the facts * * *. *It does not in the least matter what we may call the defense, whether it be estoppel or implied contract, or one partaking of the nature of both.* 194 U.S. at 565 and 568, 24 S.Ct. at 741 and 742, 48 L.Ed. 1119-1121." (App. B, pp. A65-A66) (Emphasis added).

The vital principles of estoppel are not limited to constitutional provisions protecting property rights, but apply to any constitutional right or privilege that is intended for the personal benefit or protection of the person as to whom the waiver or estoppel is claimed.[9]

It is well settled that the privilege against self-incrimination is purely a *personal privilege* given to the individual *solely for his own personal benefit. Rogers* v. *U. S.*, 340 U.S. 367, 371 (1951); *Campbell Painting Corp.* v. *Reid*, 392 U.S. 286, 288 (1968).

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9. The cases are collected and the rule summarized in 16 C.J.S., *Constitutional Law*, § 89, p. 264, where it is stated:

"*. . .* the right to assert a constitutional right or to challenge the constitutionality of a statute may be lost by waiver or estoppel if the constitutional right or provision involved is one which was made for the benefit or protection of the person as to whom the waiver or estoppel is claimed. . . ." (p. 264).

Accordingly the District Court was correct in holding that in this civil case the privilege could be and had been barred by equitable estoppel (App. B, p. A77).

With regard to relinquishment of the privilege by contract, both the District Court and the Mississippi Supreme Court have applied the rule that the privilege may be waived by a prior voluntary contract to furnish information citing § 2275 of *Wigmore on Evidence* (McNaughton Rev. 1961), and *Zap* v. *United States*, 328 U.S. 624.[10]

In every edition of his treatise, Dean Wigmore states that the privilege may be waived by prior voluntary contract, and that *"This has been the doctrine since the origin of the privilege."* *Wigmore, Evidence* (3rd Ed. 1940), § 2275, p. 435; and (1st Ed. 1904-1905), § 2275, pp. 3150-3151.

In *Zap*, this Court expressly held that constitutional rights under the 4th *and* 5th Amendments may be waived by prior voluntary contract. In *Zap*, a contractor, in order to obtain business from the government, specifically agreed to permit inspection of his accounts and records. This Court held that *by making this agreement*, the contractor voluntarily waived any constitutional claim to privacy or immunity which he otherwise might have had with respect to business documents related to the contract.

The agreement in Zap did not use the word "waive", it contained no reference whatsoever to either the 4th or

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10. Rehearing denied 329 U.S. 824, vacated on other grounds 330 U.S. 800. The "other ground" on which the decision was vacated was the absence of women on the grand jury which returned the indictment.

As hereinafter discussed (pp. 29-34), the rule announced in § 2275 of *Wigmore* and *Zap* v. *U. S.* is firmly supported by history, policy, and precedent, and the Fifth Circuit's attempt to distinguish those authorities is not valid.

5th Amendments, and there was no showing of any subjective intention to relinquish or "waive" any "known" constitutional right. Nevertheless, this Court expressly found a "waiver" because of Zap's voluntary contract. This Court stated:

> "... And petitioner's contract with the Navy Department provided: 'The accounts and records of the contractor shall be open at all times to the Government and its representatives, and such statements and returns relative to costs shall be made as may be directed by the Government.' (328 U.S. at 627).
>
> * * *
>
> "As we have pointed out in Davis v. United States, No. 404, decided this day, *the law of searches and seizures as revealed in the decisions of this Court is the product of the interplay of the Fourth and Fifth Amendments. But those rights may be waived.* And when petitioner, in order to obtain the government's business *specifically agreed to permit inspection of his accounts and records, he voluntarily waived* such claim to privacy which he otherwise might have had as respects business documents related to those contracts. ... (328 U.S. at 628).
>
> * * *
>
> *"... The waiver of such rights to privacy and to immunity as petitioner had respecting this business undertaking for the Government made admissible in evidence all the incriminating facts."* (328 U.S. at 630).

To paraphrase *Zap*, we submit that when Morgan, in order to induce USF&G to become his surety, specifically agreed to furnish financial statements showing his assets and current financial position, he voluntarily waived any constitutional right to privacy or immunity which he other-

wise might have had *with respect to his assets and financial resources.*

Under the principles announced in *Zap*, Morgan is clearly precluded from asserting any constitutional privilege that is *inconsistent* with his prior contractual undertaking to disclose his assets to USF&G.

Similar reasoning was applied by Chief Justice Traynor of the California Supreme Court in holding that a privilege against disclosure may be waived by a prior contractual undertaking to furnish information upon request, *Crest Catering Co.* v. *Superior Court*, 62 Cal.2d 274, 398 P.2d 150 (1965), quoted in the opinion of the District Court (App. B, p. A71).

In *Crest* an employer had contracted to "furnish all necessary information" in regard to a welfare fund. The administrator of the fund sought disclosure of certain employment tax returns. By specific statute, these returns were privileged and immune from discovery. In holding that the privilege had been waived, the court said:

> "*Crest* contends that the foregoing provisions do not waive the privilege because there is no specific reference either to the code provisions creating the privilege or to the tax returns. *A waiver does not depend upon meeting such a brittle requirement.* . . . .
>
> "*A waiver may occur (1) by an intentional relinquishment or (2) as 'the result of an act which, according to its natural import, is so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.'* . . ." (398 P.2d at 152).

Equitable estoppel and waivers implied from conduct are based upon objective criteria and considerations of consistency, fairness, and justice.[11]

As expressly noted by the District Court (App. B, pp. A74-A76), in civil cases, the 5th Amendment privilege may be waived by implication despite the absence of any subjective intention to relinquish or abandon the privilege. *Brown* v. *U. S.*, 356 U.S. 148 (1958), affirming *Brown* v. *U. S.*, 234 F.2d 140, at 144-145 (C.A. 6, 1956).

In the present case, Morgan induced USF&G to become his surety by means of unconditional representations and voluntary agreements that his assets were bound and would remain available for the complete protection and indemnification of USF&G. He voluntarily and specifically agreed to disclose his assets and financial position upon request. USF&G has suffered huge losses as a result of its reliance on Morgan's representations and agreements. Certainly, every principle of right, justice, and fairness dic-

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11. In regard to privileges, implied waivers are based upon considerations of fairness and consistency; such waivers do *not* depend upon the subjective intention of the privileged person. *Wigmore, Evidence* (McNaughton Rev. 1961), § 2388 at p. 855, § 2327 at pp. 635-636, § 2340 at p. 672; *U. S.* v. *Woodall*, 438 F.2d 1317, 1324-1325 (C.A. 5, En Banc 1971). "A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation." *Wigmore*, § 2327, at p. 636 (attorney-client privilege).

Since implied waivers are based upon consistency and fairness, they are closely akin to equitable estoppel. *Yoshida* v. *Liberty Mutual Insurance Co.*, 240 F.2d 824, 829-830 (C.A. 9, 1957).

Equitable estoppel is a rule of fundamental justice which, in a proper case, prevails over all other rules, including substantive rights or privileges conferred by a statute or constitution. 28 Am.Jur.2d, *Estoppel and Waiver*, § 34, p. 639. Likewise, estoppel imposes a result *regardless of the subjective intent of the party estopped, and sometimes even in defiance of it.* 28 Am.Jur.2d, *Estoppel and Waiver*, § 30, pp. 633-634. Thus, in *Glus* v. *Brooklyn Eastern District Terminal*, 359 U.S. 231, 232 (1959), this Court stated that estoppel is based on the maxim that "no man may take advantage of his own wrong."

tates that Morgan is barred and precluded from refusing to disclose his assets.

We submit, therefore, that the District Court and the Mississippi Supreme Court have correctly applied the principles of estoppel and waiver announced in prior decisions of this Court.

B. The Fifth Circuit's Attempted Distinction of the Authorities Relied on by the District Court Is Not Valid.

In reversing the District Court, a majority of the panel below embraced the dissent in *U. S.* v. *Field*, 193 F.2d 92 (C.A. 2, 1951), and concluded that the privilege cannot be relinquished by prior voluntary contract (App. A, pp. A11-A17). In this connection, the opinion below states that Professor McNaughton's 1961 Revision of § 2275 of *Wigmore on Evidence* is based on the majority opinion in *Field* and that *Field* is in conflict with *Curcio* v. *U. S.*, 354 U.S. 118 (1957). With deference, this conclusion is not sound.

First, the basic principles set forth in § 2275 of Dean Wigmore's text long antedate and are in no way dependent upon *Field*. As previously stated, in the first and every other edition of his text, Dean Wigmore states that the privilege may be waived by prior voluntary contract and that this has been the doctrine since the origin of the privilege. *Wigmore, Evidence* (3d Ed. 1940), § 2275, p. 435; and (1st Ed. 1904-1905), § 2275, pp. 3150-3151.

Dean Wigmore's statement is firmly supported by precedent and by the history, purpose, and policies of the privilege. This Court's 1964 decision in *Murphy* v. *Waterfront Commission* makes it crystal clear that the privilege is derived from a rule of law established by the English courts, both law and equity, and that English precedents are highly pertinent in determining the proper construc-

tion and application of the privilege. 378 U.S. 52 at 69, note 11, and 57, 58, 59, 77 (1964).

From the very inception of the privilege, the English courts have consistently held that in *civil* cases, the privilege may be waived by a prior voluntary contract to furnish information. *East India Co.* v. *Atkins*, 92 Eng. Rep. 1105 (1720); *South Sea Co.* v. *Bumpstead*, 25 Eng. Rep. 279 (1728).

Accordingly, in *Green* v. *Weaver*, 57 Eng. Rep. 630, 639 (1827), the court said that it had been established by a long series of decisions that a man, "*by the effect of his own acts*," may exclude himself from the protection of the privilege; or "*to adopt the expression of a very great Judge, he may contract himself out of the protection afforded by the principle. . . .*" (57 Eng. Rep. at 639).

It is clear, therefore, that the rule announced by Dean Wigmore is in no way dependent upon *Field*.

Second, *Curcio* v. *U. S.*, 354 U.S. 118 (1957) does not conflict in any way with Dean Wigmore's statement of the rule.

Curcio bears no similarity to the present case. *Curcio* arose out of the refusal of a custodian of union records to testify at a grand jury investigation of racketeering. The case merely involved the scope of the implied obligation of a *custodian of records* that results from his *assumption of the duties of custodian* (354 U.S. at 123-125). *Curcio* did not even touch upon the effect of a voluntary *contract* to furnish information.

Curcio did not mention, discuss, or in any manner imply approval of the dissent in *Field*. *Curcio* did not in any manner repudiate, criticize, or even mention the rule set forth in § 2275 of Dean Wigmore's text.

Accordingly, petitioners firmly submit that *Curcio* does *not* conflict with the established rule that the privilege may be waived by a prior voluntary contract to furnish information.

The Fifth Circuit's attempted distinction of *Zap* v. *United States* is likewise invalid. The majority below attempts to distinguish *Zap* by asserting that it involved the 4th Amendment protection against search and seizure, and not the privilege against self-incrimination. Actually, however, the defendant Zap expressly invoked the 5th Amendment and relied heavily on *Boyd* v. *U. S.*, 116 U.S. 616 (1886), discussed *supra*, p. 20. Accordingly, as noted by the District Court, a recent text on constitutional law cites *Zap* as specifically holding that the privilege against self-incrimination may be waived by a prior voluntary contract. *Antieau, Constitutional Law*, (1969) § 2.34, p. 193 (App. B, p. A75).

In a further effort to distinguish *Zap*, the majority also argues that there is a "qualitative difference" between waiver of rights guaranteed by the 4th Amendment and waiver of rights guaranteed by the 5th Amendment. (App. A, p. A16). With deference, this argument is likewise unsound. Contrary to the majority's conclusion, the 4th Amendment rights to privacy and personal security are of *equal dignity* with the 5th Amendment privilege. *Harris* v. *U. S.*, 331 U.S. 145, 150 (1947). Since *Zap* plainly holds that such 4th Amendment rights may be waived by prior contract, *it necessarily follows that the 5th Amendment privilege may also be waived by prior contract.*

Finally, the majority argues that "waiver" is an "intentional relinquishment of a known right" and that this requirement was not met. Such a conclusion completely ignores the established rule that both the requisite "intent"

and the requisite "knowledge" may be *constructive* or *implied*, instead of actual, particularly where the waiver is *implied from voluntary acts and conduct.* 92 C.J.S., *Waiver*, pp. 1060-1061.

Furthermore, as previously stated, in Zap there was no showing of any subjective intention to "waive" any "known" constitutional rights. Nevertheless, this Court expressly found a "waiver" because of Zap's voluntary contract.

After concluding that the privilege had not been relinquished by Morgan's prior voluntary contract, the majority below reversed the District Court's finding of equitable estoppel (App. A, pp. A17-A21).

In this connection the majority correctly states that *Shepard* v. *Barron*, 194 U.S. 553 (1904), and *Ralston* v. *Cox*, 123 F.2d 196 (C.A. 5, 1941),[12] did not specifically involve estoppel to assert the privilege against self-incrimination. However, those decisions (and numerous others) most assuredly do hold that constitutional rights may be lost by estoppel, *if, as is the case here, the constitutional right involved is one that is intended for the personal benefit or protection of the person as to whom the estoppel is claimed.* 16 C.J.S., *Constitutional Law*, § 89, p. 264, quoted *supra* p. 24, note 9.

Then, after expressing "doubt" that equitable estoppel "can *ever* prevent a person from asserting the privilege," the majority concludes that, in any event, estoppel does not apply here because USF&G did not "rely" upon Morgan's promise to provide it with financial statements, but instead

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12. In *Ralston* v. *Cox*, quoted by the District Court (App. B, p. A70) the Fifth Circuit said: "If constitutional rights may be waived, as is well settled, they are also subject to the legal principles of estoppel." (123 F.2d at 198).

relied *only* upon Morgan's antecedent oral promise to indemnify and the assets that stood behind this promise (App. A, p. A20).

In attempted support of this conclusion, the majority sets forth a *partial* excerpt from the 1966 decision of the Mississippi Supreme Court. The majority conclusion ignores the fact that this 1966 decision did *not* involve any question of estoppel or reliance, and the quoted excerpt merely discusses the question whether there was a valid *consideration* for Morgan's indemnity agreements in regard to the *negotiated* jobs. See 191 So.2d at 923, App. E at pp. A116-A117.[13] The quoted statement merely states that Morgan's antecedent oral promise "was *part* of the *consideration* upon which the bonds were executed." (Emphasis supplied).

With all deference, it is utterly specious to conclude that USF&G did not rely upon *all* of Morgan's numerous actions, promises, assurances, and written agreements, *the effect of which was a deliberate representation and assurance that Morgan's considerable financial resources were bound and would remain available for the complete exoneration of USF&G!*

Judge Gewin gets to the heart of this matter in the following statement from his dissent:

> "There is ample evidence in the record to support the conclusion that appellant *Morgan was the moving influence in all of the transactions under consideration.* Large sums of money are involved. *He made representations, promises and assurances in order to induce*

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13. On this same page, the Mississippi Supreme Court had already pointed out that the "competitive bid" jobs were actual *partnership* obligations of Morgan and Hyde and that there was no necessity for any additional "consideration." (App. E, pp. A116-A117).

others to act. He profited from the transactions under consideration and asserted that he was well able to indemnify and protect those *who were induced to act at his behest.* Thus having *induced, persuaded, promised* and *contracted* to repay sums of money which he caused others to lose, he should be required now to face the day of judgment. . . ." (App. A, p. A24).

III.

In Addition to the Fact That Morgan Is Barred and Precluded from Asserting the Privilege, Compliance with the Decree Does Not Present Any Real or Substantial Hazard of Incrimination.

In recent decisions this Court has emphasized that the central standard for the application of the privilege is whether the person claiming the privilege is confronted by *substantial* and *real* and not merely trifling or remote hazards of incrimination and prosecution. *Marchetti* v. *U. S.*, 390 U.S. 39, 53, 61 (1968); *U. S.* v. *Freed*, ... U.S. ....., 28 L.Ed.2d 356, 361 (1971); *California* v. *Byers*, ... U.S. ....., 29 L.Ed.2d 9, 17, 18, 19 (1971).

The only information that Morgan has been directed to furnish concerns the identity, status, location, and custody of his assets and property. Petitioners submit that Morgan is not exposed to any actual or real danger of incrimination by merely disclosing this information. It is apparent that Circuit Judge Gewin fully agrees with this contention (App. A, pp. A24-A25).

In the present civil litigation, USF&G is simply seeking to discover and locate assets that Morgan freely and voluntarily bound himself to disclose. Morgan is not appearing before any grand jury, and no prosecutor or criminal investigation is involved. The purpose of the present suit is not to compel Morgan to furnish incriminat-

ing evidence against himself in any criminal case, present or future.

In the setting of the present civil case, which was brought for the proper and legitimate purpose of enforcing a prior judicial decree, Morgan is not exposed to any *real* and *substantial* danger of incrimination by merely making a written disclosure of his assets as directed by the 1967 decree. *Kirtley* v. *Abrams*, 184 F.Supp. 65 (U.S.D.C. N.Y., 1960).

Judge Gewin emphatically states that Morgan should not be permitted to nullify the Chancellor's decree "by suggesting an *imaginary* and *elusive possibility* of a criminal prosecution . . ." (App. A, p. A24).

At most, Morgan merely shows a "remote and naked possibility" that should not be suffered to obstruct the administration of civil justice. *Brown* v. *Walker*, 161 U.S. 591, 599, 600 (1861).

IV.

Morgan Was Properly Adjudged in Civil Contempt for Refusal to Comply with That Part of the Decree Which Enforces Specific Performance of His Voluntary Agreement to Furnish Financial Statements, Even If It Be Held That He Is Not Bound to Comply with the Other Requirements of the Decree.

The majority opinion below fails to accord any significance whatsoever to the vitally important fact that the State court decree granted two separate and distinct forms of relief: (1) *specific performance* of Morgan's voluntary and express contractual agreement to furnish financial statements (not under oath), and (2) *discovery* under oath of Morgan's assets.

The District Court held that Morgan has been validly directed to furnish both (1) the financial statement required by paragraph 6 of the 1967 decree, and (2) the discovery required by paragraph 7 of the 1967 decree (App. B, pp. A77-A78).

The District Court further held that, even if it be assumed that Morgan is not required to furnish the discovery as directed by paragraph 7, *"it is perfectly clear that the financial statement must be furnished and [Morgan's] refusal to furnish it herein justifies his adjudication of civil contempt."* (App. B, p. A78, 321 F.Supp. at 591).

The District Court was clearly correct in so holding. Morgan's voluntary and express contract to furnish the financial statement must be held to override any possible claim of privilege *insofar as the financial statement is concerned.* The principles announced in *Zap* are decisive on this point and plainly established that Morgan is bound by his express contractual obligation.

Since Morgan has been validly directed to furnish the financial statement, he was properly adjudged in civil contempt for refusing to do so, even if it be held that he is not required to furnish the discovery.

The District Court's holding on this point is firmly supported by the established rule that, even if a decree which forms the basis of a contempt charge is void or erroneous in part, nevertheless, *if the decree is valid in part, failure to comply with the valid part justifies an adjudication of civil contempt.* See 17 C.J.S., *Contempt,* § 14, pp. 40-41, and *Tinsley* v. *Anderson,* 171 U.S. 101, 107 (1897), affirming dismissals of habeas corpus applications growing out of a State court civil contempt decree.

In view of the foregoing, petitioners respectfully submit that even if it be assumed or held that Morgan is not required to furnish the discovery, nevertheless, that part of the decree which enforces specific performance of Morgan's voluntary agreement to furnish financial statements is unquestionably valid and fully justifies the civil contempt decree. Consequently, Morgan is not entitled to habeas corpus relief.

V.

Under the 5th Amendment and the Supremacy Clause, the Federal Courts Should Permit Enforcement of the State Court Decree by Affording a Judicially Established Use Immunity in Regard to the Disclosures Required by the State Court Decree.

In the concluding part of its opinion (App. A, p. A22), the majority states that its decision "does not necessarily mean that Morgan cannot be required to provide the information" directed by the Chancellor's decree, since this information may be required regardless of the privilege "if there is immunity from federal and state use" of the information or its fruits.

However, after making this statement, the majority declined to establish such "use immunity" and stated that they would "leave the matter [of immunity] in the good hands of the courts of Mississippi." (App. A, p. A22).

In making this holding the majority was undoubtedly influenced by the erroneous assumption that the Mississippi court possesses the power to grant immunity from the use of the information. Actually, however, the Mississippi Supreme Court has expressly held that it does *not* possess such power. *Hubbard* v. *McKey*, 193 So.2d 129, 131 (Miss. 1966).

In his dissent, Judge Gewin strongly urged that the *Federal* courts should permit enforcement of the Chan-

cellor's decree by affording a judicially established use immunity, and adjudicating that Morgan must furnish the information required by the decree, but he shall not be subject to any criminal proceeding based upon such disclosure or its fruits (App. A, pp. A22-A23).

Petitioners respectfully submit that the solution urged by Judge Gewin is thoroughly sound and should be followed, since it would permit orderly enforcement of the State court civil decree, while at the same time fully preserving Morgan's constitutional rights. With deference, it accomplishes absolutely nothing for the majority to "leave the matter in the good hands of the courts of Mississippi," since the effect of the majority opinion is to completely shackle the hands of the State courts.

On the other hand, the 5th Amendment and the Supremacy Clause clearly empower the *Federal* courts to permit enforcement of the State court decree as suggested by Judge Gewin.

Since this Court's decision in *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964), several courts have held that disclosures may be compelled regardless of the privilege, if there is "immunity from federal and state *use*" of the compelled disclosure or its fruits in connection with a criminal prosecution.

These cases hold that complete immunity from prosecution ("transactional immunity") is not required, but immunity from use ("use immunity") is sufficient. *Zicarelli* v. *New Jersey State Commission,* 55 N.J. 249, 261 A.2d 129, 137-140 (1970), prob. juris. noted 401 U.S. 933, 28 L.Ed.2d 213 (1971); *Uniformed Sanitation Men Association* v. *Commissioner,* 426 F.2d 619, 623-624 (C.A. 2, 1970), motion to advance denied, ... U.S. ....., 29 L.Ed.2d 693 (1971); *Kastigar* v. *United States,* 440 F.2d 954, 957 (C.A.

9, 1971), cert. granted May 17, 1971, ... U.S. ....., 39 Law Week 3511 (1971); and *California* v. *Byers*, 29 L.Ed.2d 9, 16 (1971), which refers to a "judicially-created use restriction on the disclosures."

It is clear that adequate "use immunity" may be afforded without the necessity of any statute. Under the Supremacy Clause and the 5th Amendment, the *Federal* courts have ample power to adjudicate that a person shall be entitled "use immunity." Thus, in *Murphy*, this Court stated:

> ". . . The Court, in an opinion joined by seven members, made the following significant statement: 'a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. *The Fifth Amendment takes care of that without a statute.*' . . ." (378 U.S. at 75).[14]

In the present case, the Federal Constitution and an appropriate adjudication by the Federal courts will afford fully adequate "use immunity" to Morgan. Consequently it is not necessary that there be any Mississippi statute conferring such immunity.

Petitioners submit, therefore, that the Federal courts should permit enforcement of the State court decree by adjudicating that Morgan must furnish the information required by that decree, but he shall not be subject to any criminal proceeding based upon the information disclosed or its fruits.

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14. The Second Circuit has held that a statute is not an essential prerequisite to the existence of "use immunity." *Uniformed Sanitation Men Association* v. *Commissioner, supra*, 426 F.2d 619 at 626 (C.A. 2, 1970).

CONCLUSION

In two separate opinions, after careful and thorough consideration, the Mississippi Supreme Court has expressly held that Morgan has waived and is estopped to invoke the privilege as an excuse for refusing to disclose his assets to USF&G. Likewise, after a searching study of the case, the District Court has agreed with the Mississippi Supreme Court.

Regardless of all the strained arguments that might be advanced to the contrary, petitioners submit that it is fundamentally wrong by both legal and moral standards to permit Morgan to refuse to disclose his assets to USF&G.

The District Court concisely expressed this same thought. After holding that Morgan had waived and is estopped to invoke the privilege, the District Court stated: "To hold otherwise would be contrary to the established law, the equitities of the situation, and would be unconscionable." (App. B, p. A77).

For the foregoing reasons, it is respectfully submitted that a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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